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No. 516

IN THE

Supreme Court of the United States

October Term, 1950

The Montana Power Company, a corporation,

Petitioner

v.

Federal Power Commission,

Respondent

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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IN THE

Supreme Court of the United States

October Term, 1950

No. .....

The Montana Power Company, a corporation,
Petitioner

vs.

Federal Power Commission,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

The Petitioner, THE MONTANA POWER COMPANY,[1] prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in the above entitled case.

OPINIONS BELOW

The Court of Appeals affirmed an order of the Federal Power Commission requiring the Company to apply for licenses under the Federal Power Act for six hydroelectric developments in the Missouri River above Fort Benton, Montana, and one reservoir on the Madison River, all owned and operated by the Company in Montana. The court below held that the portion of the river in which the six Missouri River plants are located is "navigable waters" as that term

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[1] In this petition Petitioner will be referred to as the "Company" and Respondent will be referred to as the "Commission."

is defined in the Federal Power Act (R. 1673), and that one of those developments and the Madison River reservoir occupy lands of the United States without valid authorizations (R. 1675).

The Commission's order covers a seventh development in the Missouri River, but that plant was purchased by the United States shortly after the Commission's order was issued and the court below remanded that phase of the case to the Commission for further consideration as to that plant alone (R. 1675). This action of the court below is not considered a ground for certiorari, but if the writ is granted the Company will contend that the remand was error.

The Opinion of the Federal Power Commission (R. 54) is reported in 77 PUR NS 299. The Opinion of the Court below (R. 1670) is reported in ..... F 2d ..... .

JURISDICTION

The judgment of the court below was entered on October 4, 1950 (R. 1670). A petition for rehearing filed on October 18, 1950 (R. 1677) was denied on November 1, 1950 (R. 1681). The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1) and under Section 313 (b) of the Federal Power Act (49 Stat. 838, 16 U.S.C. 791 et seq.).

QUESTIONS PRESENTED

The questions for determination are:

1. Whether the 49-mile reach of the Missouri River extending from Fort Benton, Montana, upstream to the mouth of the Sun River, in which the total fall is 694 feet, is a navigable water of the United States as defined in Section 3(8) of the Federal Power Act[2] where:

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[2] Sec. 3(8) provides:

"'navigable waters' means those parts of streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States, and which either in their natural or improved condition notwithstanding interrup-

(a) There was an extensive seasonal interstate commerce by river steamboat as far upstream as Fort Benton, 520 miles above the Montana-North Dakota state line, from 1860 to 1887. All of this traffic left the river at that point and proceeded overland by wagon train and ox team to points of destination, a large portion going to forts and mining camps near the river from 150 to 250 miles above Fort Benton. Downstream traffic came overland to Fort Benton.

(b) The upper 17 miles of the 49-mile reach, in which 17 miles alone the fall totalled 520 feet, including four vertical falls of from 24 to 73 feet, constituted such a complete barrier to use in either direction that no attempt was ever made to transport persons or property in either direction or even to float logs or lumber downstream through any part of it. Four of the Company's plants are located in this section.

(c) The lower 32 miles of the 49-mile reach, with a fall of 174 feet, is so precipitous and rapid that no attempt was ever made to use any portion of it for any commercial purpose; the sole evidence of any "navigation" whatever on this 32 miles consists of reports of not to exceed three stunt trips by river steamboats during flood stage, motivated only by the desire of their skippers to set a record for having taken a boat farther up-stream than any other boat had ever gone.

(d) The only reported instance of traffic around the falls depends on extremely questionable evidence (see page 13 of this Petition) that in 1866 and 1867 miners returning to the "States" were carried in small boats from near Helena

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tions between the navigable parts of such streams or waters by falls, shallows, or rapids compelling land carriage, are used or suitable for use for the transportation of persons or property in interstate or foreign commerce, including therein all such interrupting falls, shallows, or rapids, together with such other parts of streams as shall have been authorized by Congress for improvement by the United States or shall have been recommended to Congress for such improvement after investigation under its authority;"

to a point above the 49-mile reach, where the passengers were transported around the falls section in light wagons.

(e) Use of the river above the falls was limited to a small amount of purely local traffic (with the possible single exception of the miners mentioned in the preceding paragraph). This use is described in question 2 below.

(f) No part of the 49-mile reach was ever improved or recommended for improvement. On the contrary, the Chief of Engineers consistently reported to Congress at all times that the entire 49 miles was non-navigable and not susceptible of improvement.

2. Whether the 263-mile reach of the Missouri River from Fort Benton, Montana, upstream to the headwaters at Three Forks, Montana, is a navigable water of the United States as defined in Sec. 3(8), where:

(a) The lower 49 miles of the 263-mile reach is the falls section, described in the preceding question.

(b) The remaining 214 miles above the falls consists of a 55-mile section known as the "Long Pool" and a rapids section from the head of the Pool to Three Forks. As to these sections, the evidence shows:

(i) The Long Pool is a 55-mile reach just above the falls with an average slope of only six inches to the mile where the limited operation of light draught boats was defeated by shoals and which was used in the 1890's for a small amount of purely local traffic, principally by two steam launches. Even this use was confined almost entirely to the lower 16 miles where the government from 1895 to 1898 expended $66,000 in the construction of a 2½-foot channel which was then abandoned without having produced any noticeable effect on commerce.

(ii) The 159 miles between the head of the Long Pool and Three Forks had an average slope of about 4.3 feet per mile. The only use of this section was: In 1887 the Fern, a houseboat drawing 2½ feet of water, was brought downstream without freight or passengers to the City of Great

Falls, where she ran irregularly on the Long Pool for three or four years; the Rose, an excursion launch drawing 18 inches, carried picnickers for several years from her owner's ranch at the Gates of the Mountains near Helena to picnic grounds six or seven miles below; the Rose also made one round trip from the ranch to Great Falls without freight or passengers in 1887, and in 1892 she carried 17 passengers to Craig, 29 miles below the ranch; explorers, surveyors, and adventurers made a few downstream trips in skiffs, row boats, etc.; there was a limited amount of logging and lumbering in the early days for local use at the City of Great Falls and at Cascade, near the head of the Long Pool. In 1880 the government spent $15,000 in rock removal and construction of wing dams at two rapids above the Long Pool. No work was thereafter done in this section.

3. Whether the construction by the United States of the Fort Peck dam some 185 miles upstream from the Montana-North Dakota state line and about 335 miles downstream from Fort Benton, pursuant to an Act of Congress which specifically provided that it should be constructed in accordance with the plans and subject to the conditions set forth in the Chief of Engineers "308" report on the Missouri River,[3] which repeatedly declared that the construction of the dam would render the river above it non-navigable, together with the subsequent authorization by Congress of five other dams known as the Pick-Sloan dams, downstream from Fort Peck, with no provision either at Fort Peck or at any of the Pick-Sloan dams for facilities for by-passing the dams with boats or cargo, does not constitute an abandonment by Congress of interstate navigability past and above Fort Peck.

4. Where the Secretary of Agriculture in 1914, prior to the enactment of the Federal Water Power Act, duly issued to the Company's wholly owned subsidiary a Final Power

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[3] House Document No. 238, 73rd Congress, 2d Session, lodged with Clerk.

Permit under the Act of February 15, 1901,[4] authorizing occupancy of all government lands at the Hebgen Dam and reservoir, which Permit was acquired directly by the Company through the liquidation and dissolution of its wholly owned subsidiary in 1934, without the formal approval by the Secretary required for a "transfer to a new permittee," and the Permit specifically provides that unless previously revoked by the Secretary it shall terminate in 1964, and that no revocation will be made until due notice is given the Permittee, and the applicable regulations of the Secretary of Agriculture provide that no final permit will be deemed to be terminated except upon formal revocation thereof by the Secretary, and no such notice has ever been given and no action of any kind taken to revoke the Permit, but, on the contrary, the Secretary of Agriculture, with full knowledge of the facts, has continued to collect the prescribed rentals from the Company and to treat the Permit as valid and existing,

(a) Whether the Commission has authority to declare the Permit invalid in this proceeding on the ground that, in its opinion, the acquisition by the Company was in violation of a provision of the Permit and the Regulations with reference to "transfer to a new permittee," the Secretary of Agriculture having at no time participated in this proceeding;

(b) Whether the acquisition by the Company was a "transfer to a new permittee" within the meaning of the Permit provisions;

(c) Whether exaction and collection by the Secretary of Agriculture from the Company of the rentals prescribed in the Permit, annually since 1935, is not a recognition by the Secretary that the Company is the Permittee.

(d) Whether the Company does not occupy the government lands at Hebgen under a permit or valid existing right

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[4] 31 Stat. 790, 16 U.S.C. 79, 522, 43 U.S.C. 959; App. p. A4 (App. refers to the Appendix to this Petition).

of way within the meaning of Sections 23(a) and 23(b) of the Federal Power Act.

(Determination of any one of these questions in favor of the Company would render unnecessary determination of the others.)

5. Where the Secretary of the Interior in 1907 duly issued to the Company's predecessor a Right of Way under the Act of February 15, 1901, authorizing occupancy of all public lands at the Hauser Dam and reservoir, and the Company acquired the Right of Way in 1912 through the merger of a corporation and its three wholly-owned subsidiaries to form the Company without the formal approval of the Secretary required for a "transfer to a new permittee," and the applicable regulations of the Secretary of the Interior, issued prior to the enactment of the Federal Water Power Act of 1920, provide that no permit will be deemed to be revoked except on the issuance by the Secretary of a specific order of revocation, and no such order has ever been issued and no action has ever been taken to revoke the Right of Way, but, on the contrary, the Secretary of the Interior in 1929 gave written notice to the Company prescribing rentals for the occupancy of the public lands and has ever since exacted and collected from the Company the prescribed rentals; and

Where the Forest Service in 1907 duly issued to the same predecessor of the Company a non-transferable Special Privilege Agreement under the Act of February 15, 1901, authorizing occupancy of all forest lands at the Hauser Dam and reservoir, which Agreement was acquired by the Company in 1912 in the same manner as the Interior Department Right of Way mentioned above, and where the applicable regulations of the Secretary of Agriculture, issued prior to the enactment of the Federal Water Power Act of 1920, provide that no permit will be deemed to be terminated except upon formal revocation thereof by the Secretary and until the permittee shall have had a reasonable time to show cause, and no such order has ever been made and no notice

or order to show cause ever issued, but, on the contrary, the Secretary of Agriculture has at all times since 1912 exacted and collected from the Company the prescribed rentals; and

Where both the Secretary of the Interior and the Secretary of Agriculture in granting the Joint Final Power Permit for the Holter project to the Company on April 22, 1920, specifically recognized the Company as the owner of Hauser,

(a) Whether the Commission has authority to declare either the Right of Way or the Agreement invalid in this proceeding on the ground that, in its opinion, their acquisition by the Company through the merger in 1912 was in violation of provisions of the regulations with reference to "transfer to a new permittee," neither the Secretary of the Interior nor the Secretary of Agriculture having participated in this proceeding at any time;

(b) Whether the acquisition of either authorization by the Company was a "transfer to a new permittee" within the meaning of the applicable regulations;

(c) Whether the exaction and collection by the Secretary having jurisdiction, from the Company, of the prescribed rentals is not a recognition by such Secretary that the Company is the Permittee;

(d) Whether the Company does not occupy the forest lands and public lands at Hauser under a permit and a valid existing right of way within the meaning of Sections 23(a) and 23(b) of the Federal Power Act.

(Determination of any one of these questions in favor of the Company would render unnecessary determination of the others.)

6. Whether the interpretation placed by the court below on the Federal Power Act, particularly Sections 3(8), 23(a) and 23(b), is not contrary to the intent of Congress as declared in the Congressional proceedings leading up to their enactment.

7. Whether hearsay evidence consisting of newspaper items, not purporting to state facts within the knowledge

of the writer, and a letter written by the then Chief of Engineers to the Chairman of the Federal Power Commission only two days before the hearing closed, in response to an oral inquiry made by the Chairman on the preceding day, stating it to be the position of the Corps of Engineers that the Missouri is a navigable water of the United States from its mouth to Stubbs Ferry, and that there is a presumption of navigability of the section from Stubbs Ferry to Three Forks, and that the construction of the Fort Peck Dam, or any other Missouri River dam, did not have the effect of bringing the head of navigability downstream to a point below the dam in question, all admitted over timely objection, constitute substantial evidence in a proceeding in which important property rights are determined.

STATUTES INVOLVED

The pertinent statutes and regulations are set out in the Appendix, infra, pages A1 to A8.

STATEMENT

The order to show cause as amended recited that the Company owns and operates seven hydroelectric developments in the Missouri River in Montana, and that the Missouri River is a navigable water of the United States. It directed the Company to show cause why it should not apply for Federal Power Commission licenses for these seven plants (R. 12-14, 20-21).

All seven plants are located above Fort Benton, Montana. The map following page 10 of this Petition shows the location of the plants and other important points. The Table at page A8 of the Appendix shows river distances between points on the river. Four of the seven plants are near the City of Great Falls; the remaining three are located near Helena, about 100 miles upstream from the Great Falls plants. Starting with the farthest downstream, these plants and the dates they were placed in operation are: Morony, 1930; Ryan (formerly Volta), 1915; Rainbow, 1910; Black

Eagle, built in 1891 and reconstructed in 1927; Holter, 1918; Hauser, 1907; and Canyon Ferry, 1898 (R. 280-284). The United States purchased the Company's Canyon Ferry development in 1949 (R. 1675).

The court below held that the Missouri River is a navigable water of the United States from its mouth to Three Forks, Montana, where the Missouri is formed by the junction of the Gallatin, Madison and Jefferson Rivers (R. 1670-4).

Only if the 263-mile reach from Fort Benton to Three Forks is a navigable water of the United States within the meaning of Sections 3(8) and 23(b) of the Federal Power Act can licenses be required for any of the four Great Falls plants, none of which occupies any government lands, or for Holter, where the Company's permit to occupy government lands is conceded to be valid (R. 1674). As to Hauser, there is the additional question whether the government lands there are occupied under valid authorization. Since the Madison is concededly non-navigable (R. 1674), Hebgen is subject to license only if the Final Power Permit under which it occupies government lands is invalid.

Since all of the plants in question were in operation by 1930, the last sentence of Section 23(b), which was enacted in 1935, and is not retroactive, has no application; prior to the 1935 amendment, there was no requirement that a declaration of intention be filed for a plant not in navigable waters of the United States.[5]

Navigable Waters of the United States.

Physical Characteristics.

From the headwaters of the Missouri at Three Forks, Montana, to its mouth a few miles above St. Louis, Missouri, is a river distance of 2475 miles. Fort Benton, Montana, is 263 miles below Three Forks and 2212 miles above the mouth. From the mouth to a point about 172 miles below Fort Ben-

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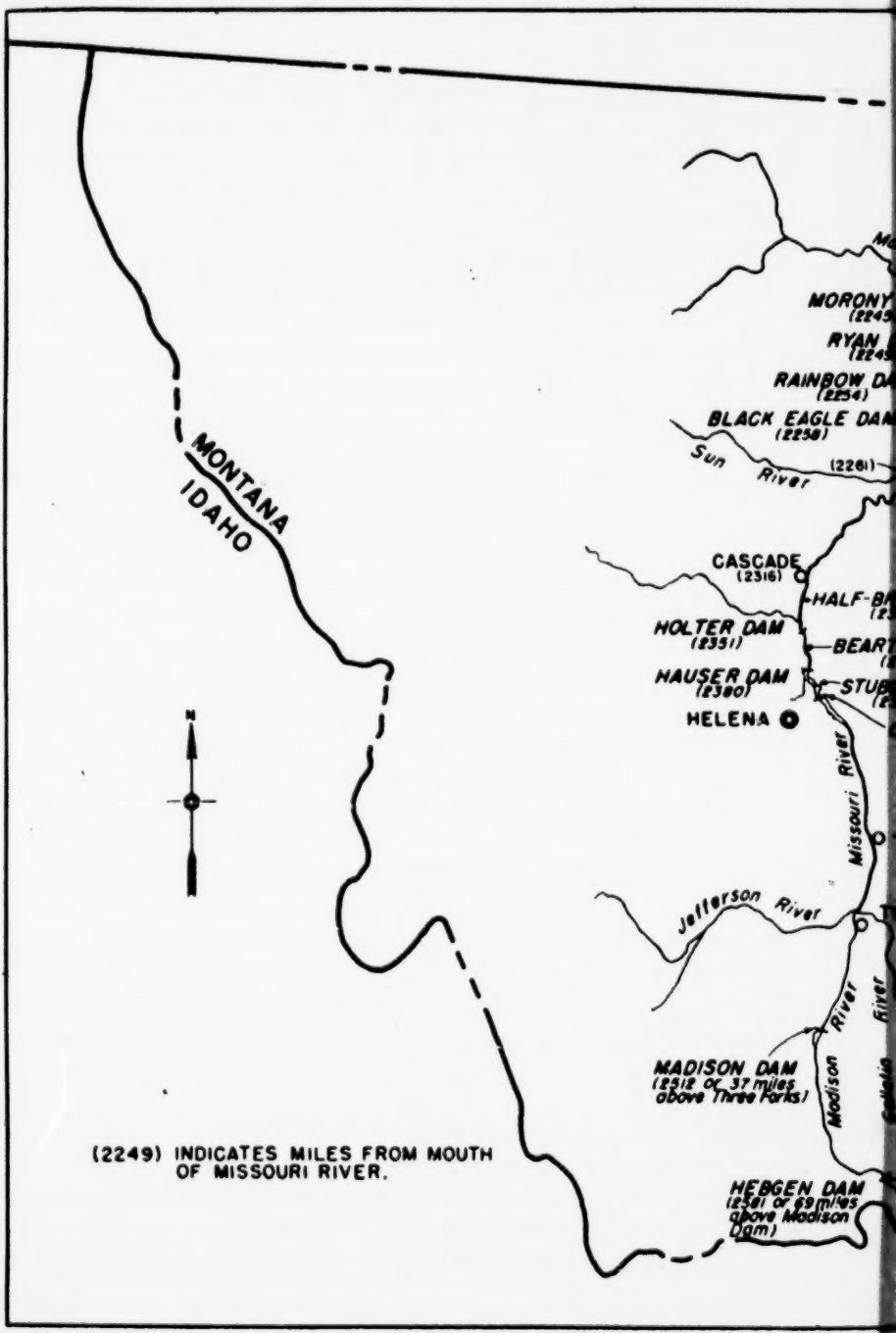
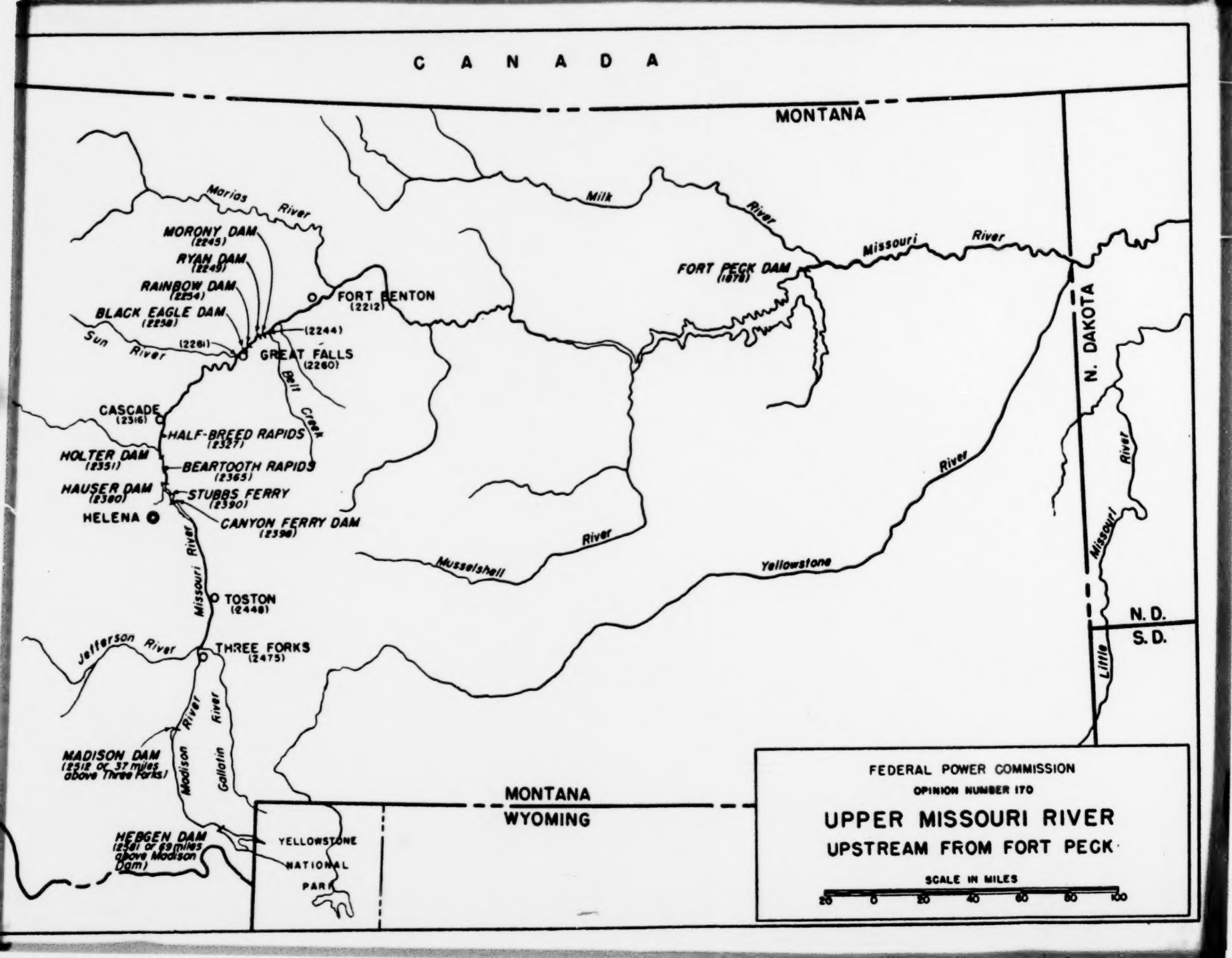
[5] Sec. 23 Federal Water Power Act of 1920, 41 Stat. 1075; App. p. A3.


MONTANA
IDAHO
MORONY
(2245
RYAN
(2249
RAINBOW DA
(2254)
BLACK EAGLE DAM
(2258)
Sun River
(2261)
CASCADE
(2316)
HALF-BR
(2
HOLTER DAM
(2351)
BEART
(
HAUSER DAM
(2380)
STUB
(2
HELENA
N
Missouri River
Jefferson River
Madison River
MADISON DAM
(2512 or 37 miles
above Three Forks)
HEBGEN DAM
(2581 or 69 miles
above Madison
Dam)
(2249) INDICATES MILES FROM MOUTH
OF MISSOURI RIVER.


CANADA
MONTANA
Marias River
Milk River
Missouri River
MORONY DAM (2245)
RYAN DAM (2249)
RAINBOW DAM (2254)
BLACK EAGLE DAM (2258)
FORT BENTON (2212)
(2244)
(2281)
Sun River
GREAT FALLS (2260)
Belt Creek
FORT PECK DAM (1878)
N. DAKOTA
CASCADE (2316)
HALF-BREED RAPIDS (2327)
HOLTER DAM (2351)
BEARTOOTH RAPIDS (2365)
HAUSER DAM (2380)
STUBBS FERRY (2390)
HELENA
CANYON FERRY DAM (2398)
Missouri River
Musselshell River
Yellowstone River
Missouri River
TOSTON (2448)
N. D.
S. D.
Jefferson River
THREE FORKS (2475)
Little Missouri River
Madison River
Gallatin River
MADISON DAM (2512 or 37 miles above Three Forks)
HEBGEN DAM (2561 or 69 miles above Madison Dam)
YELLOWSTONE NATIONAL PARK
MONTANA
WYOMING
FEDERAL POWER COMMISSION
OPINION NUMBER 170
UPPER MISSOURI RIVER
UPSTREAM FROM FORT PECK
SCALE IN MILES
20 0 20 40 60 80 100

ton the average slope varies from .9 of a foot per mile to 1.13 feet per mile, and the principal obstacles to early day navigation were snags and shifting sand bars (R. 753, 754, 1011). In the 172 miles next below Fort Benton the average slope is 2.27 feet per mile, and the steamboats which in pioneer days made Fort Benton the head of navigation surmounted this rapid reach with difficulty (R. 545, 754).

The section of the Missouri River here involved is entirely within the state of Montana. It commences at Fort Benton, 520 miles above the Montana-North Dakota state line, and extends upstream 263 miles to the headwaters at Three Forks.

49 miles above Fort Benton the Sun River flows into the Missouri at a point opposite the City of Great Falls. The total fall in the 49 miles is 694 feet (Ex. 112, Vol. V). In the upper 17 miles, known as the "great falls of the Missouri", the river falls 520 feet (R. 1671), including four sheer falls varying from 24 to 73 feet in height. In the 32 miles below the falls the river drops 174 feet, or about 5.4 feet to the mile (Ex. 112, Vol. V), and was described by the Army Engineers as the "tailing out of the falls." The entire 49-mile reach was always described by the Army Engineers as non-navigable and not susceptible of improvement (R. 557, 559).

From Sun River upstream to Cascade, a distance of 55 miles, the river has an average slope of about 6 inches per mile, and is known as the "Long Pool" (R. 563). The 159-mile reach from Cascade to Three Forks has an average slope of over 4.3 feet per mile, and includes the Half-breed Rapids, about 11 miles above Cascade, and the Bear Tooth Rapids, 38 miles farther upstream (R. 755, 756).

Actual Use of River

There was no dearth of concededly admissible evidence of such use as was made of the Missouri River in Montana. The journals of Lewis and Clark, the reports of the Army Engineers from 1868 to 1945, the "308" report on the Mis-

souri River, contributions to historical societies, oral testimony by a score of witnesses, and references to standard historical works covered this phase of the case adequately.

Serious dispute did arise over the admissibility of hearsay evidence, principally newspaper items. The Commission offered numerous such items, very few of which even purported to be firsthand accounts (Exs. 18, 21, R. 1139, 1209). The Examiner admitted any and all which were over fifty years old (R. 897), and the Commission sustained him (R. 51). The court below apparently relied on certain of these items (R. 1676).

The letter from the Chief of Engineers, containing conclusions of law as to navigability (described in Question 7), was admitted by the Examiner, over objection, as "a statement of position," the Examiner specifically stating that the letter was not evidence (R. 1040). The Commission admitted the letter as evidence (R. 52). The court below quotes from the letter (R. 1673).

The earliest use of the Missouri River in Montana was in 1805, when the Lewis and Clark exploratory expedition pushed upstream with two pirogues and six canoes. One pirogue was left below Fort Benton and the other at the mouth of Belt Creek, when the party proceeded overland around the falls section (R. 992, 1566). The explorers ultimately poled and dragged their small canoes up the river to Three Forks, then up the Jefferson and Beaverhead Rivers to a point about 100 miles above Three Forks. Their journals describe in great detail the region traversed and the difficulties encountered (Exs. 24, 161, 162, 163, 164).

There was virtually no use of the Missouri in Montana for the next half century.

From 1860 to 1887, when the railroad reached this section, there was a considerable traffic by river steamboat during the high water season each year as far upstream as Fort Benton, which became famous as the head of navigation on the Missouri (R. 587, 588). Travelers and freight were transported from this landing to their destinations by stage

coach and wagon train, but did not again take to the river above Fort Benton. Similarly, passengers and freight were transported overland to Fort Benton for shipment downstream (R. 860-897).

Turning now to the 263-mile reach above Fort Benton, the court below held that the Missouri is navigable for a distance of 30 miles above Fort Benton on evidence of not to exceed three stunt trips in 1866 and 1867 by river steamboats from Fort Benton. Chittenden, an authoritative historian, in his book, "Early Steamboat Travel on the Missouri River," states:

> "On June 16, 1866, the steamer Peter Balen ascended the river to the mouth of Belt Creek, six miles from the Great Falls, and thirty-one miles above Fort Benton. This is believed to be the farthest point reached by steam on the Missouri River.* The feat was accomplished during the June flood and would have been impossible at ordinary stages. Fort Benton has always been considered the head of navigation on the Missouri River."

The star refers to a footnote which reads as follows:

> "The Tom Stevens is said to have gone to the mouth of Portage creek, within five miles of the Great Falls the same year, and one authority states that the Gallatin, either in 1866 or 1867, went nearer to the Falls than any other boat before or since. The exact point is not stated." (Chittenden, Vol. 1, p. 220.)

These stunt trips had no commercial significance.

With reference to through use of the 263-mile reach, the court below states:

> "*The only reported use* of the entire length of the upper river for through traffic from above the falls to Fort Benton below occurred from 1864 to 1870. During that period, gold miners in considerable number traveled downstream with the aid of a portage or 'land carriage' around the falls." (Emphasis supplied) (R. 1671).

The court apparently based this statement upon two newspaper items and an advertisement in the "Helena Gazette" of September 8th, 1866 (Ex. 18, R. 1139), one item in the "Helena Herald" of September 26th, 1867 (Ex. 21, R. 1210), and a footnote in Bancroft's "History of Washington, Idaho and Montana" which stated that a stage line carried miners to a point on the Missouri 15 miles from Helena, whence mackinaw boats carried them to the falls in 25 hours, and that a portage was made around the falls in light wagons (Ex. 31, R. 1417). The authority for the statement is not given.

The official reports of the Army Engineers made annually commencing in 1868 (which covered preceding years) and describing traffic on the river in detail, make no mention of any such travel (Exs. 17A, 17B, 17C, lodged with Clerk). The report of Thomas P. Roberts, who in 1872 made an examination of the river and its navigation possibilities from Three Forks to Sioux City, Iowa, for the Northern Pacific Railroad Company, does not refer to any such use (Ex. 20, R. 1147).

There is absolutely nothing in the record to suggest any use before 1866 or after 1867. The period 1864 to 1870 designated by the court below for such travel must be taken from the conjecture in the Commission's opinion, which says:

> " * * * Nor does the record fix the beginning and ending of this particular use of the River. Probably it started soon after the 1864 discovery of gold at Helena. Chances are it diminished soon after 1868 when most of the gold had been extracted, and ceased around 1870 when the placers were exhausted." (R. 67).

The only other reference in the opinion of the court below to use of the river above Fort Benton is the statement:

> " * * * And the river above the falls was used for the transportation of logs and rafts of lumber as well as for local carriage of freight and passengers." (R. 1671).

That use was as follows:

(1) In 1887 the Fern, a houseboat drawing 2½ feet of water, was brought downstream without freight or passengers to the City of Great Falls at the lower end of the Long Pool, and ran irregularly for three or four years on the Long Pool, mostly on the lower 16 miles thereof, carrying hay, firewood, wool and picnickers (R. 567, 568).

(2) The Rose, a steam launch drawing 18 inches of water, carried picnickers from her owner's ranch at the Gates of the Mountains near Helena to picnic grounds not over 6 miles downstream for a number of years after 1886; she made one round trip to the City of Great Falls in 1887 without freight or passengers and one trip to Craig, 29 miles below the ranch, in 1892 with 17 passengers. On the return trip without load she had to wait two weeks before it was safe to attempt to ascend Bear Tooth Rapids. Never again did she go below the Bear Tooth Rapids, 7 miles below the ranch, nor did she go upstream above the ranch (R. 390-397). Ex. 111, Vol. IV, is a picture of the Rose, which was the only craft, except the canoes of Lewis and Clark, ever to travel upstream above the Long Pool.

(3) The following use on the Long Pool: two steam launches, the Minnie and the J. J. Hill, were used from 1892 to 1899, towing barges carrying picnickers to two parks a few miles above the city (R. 416); one small steam launch, the Frances, was used for pleasure purposes (R. 256); some local freight and passengers were carried on the Long Pool by an unnamed boat whose draught is not given, from 1896 to 1898, this use being confined almost entirely to the lower 16 miles, where the United States was constructing a 2½ foot channel (R. 559-560); a small government towboat built by the Army Engineers in 1896, at a cost of $2200.00, was used for two or three years in construction work on the lower end of the Long Pool (R. 419, Ex. 17B, 1897, p. 2191).

(4) A few downstream trips in skiffs, rowboats, etc., by explorers, surveyors and adventurers.

(5) From 1879 to 1895 some logs and lumber were

floated at high water for local use at the City of Great Falls from points 40 to 100 miles upstream (R. 423, 1144-5). There was similar use to Cascade at the head of the Long Pool from points up to 40 miles above in 1902 and 1903 (R. 387-390). No attempt was made to run logs or lumber over the falls (R. 1144).

In 1880 the government spent $15,000 removing rock at the Bear Tooth and Halfbreed rapids; from 1895 to 1898, $66,000 was expended in the construction of a 2½-foot channel, 16 miles in length, at the lower end of the Long Pool. All construction work was abandoned in 1898 (R. 559-560).

On the foregoing evidence the court below affirmed the Commission's holding that the entire 263 miles from Fort Benton to Three Forks is a navigable water of the United States within the meaning of Section 3(8) (R. 1673).

Fort Peck and Pick-Sloan Plan

The Act of August 30, 1935,[6] authorized the construction of Fort Peck dam, 185 miles above the Montana-North Dakota state line and 335 miles below Fort Benton, in accordance with the plans and subject to the conditions set forth in House Document No. 238, 73d Congress, 2d Session. House Document 238 repeatedly states that the construction of the reservoir would render the entire section from Fort Peck to Fort Benton non-navigable (R. 752, 753).

Thereafter Congress adopted the Pick-Sloan plan,[7] authorizing five dams in the Missouri between Yankton, in southeastern South Dakota, and Garrison in North Dakota, none of which has any provision for navigation facilities (R. 583, 648).

The court below held that this did not constitute an abandonment by Congress of interstate navigability above Fort Peck.

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[6] 49 Stat. 1028, 1034.

[7] 58 Stat. 887, 891.

Occupancy of Government Lands

Great Falls Plants and Holter

None of the Great Falls plants occupies any government land (R. 79, 80). The court below found that Holter is maintained under a valid authority to occupy public lands (R. 1674).[8]

Hebgen

In 1914 the Secretary of Agriculture granted a Final Power Permit under the Act of February 15, 1901, covering all government lands at Hebgen, to the Company's wholly owned subsidiary (R. 996, 1099). In 1934 the Company surrendered all of the stock and assumed all of the liabilities of the subsidiary in exchange for all of its property, including the Permit (R. 996), without the formal approval of the Secretary required for a "transfer to a new permittee." Rentals under the Permit were based on the increased power production at downstream plants of the Company (R. 1111).

The Permit provides that it may be "transferred to a new permittee" under certain conditions, including approval by the Secretary, that unless sooner revoked by the Secretary it terminates in 1964, and that it may be revoked for a violation of any of its terms, but that no revocation will be made until the permittee has been served with notice of the violation and given a reasonable time to show cause why the permit should not be revoked (R. 1101). The applicable regulations have since 1915 provided that no permit will be deemed to be terminated except on formal revocation by the Secretary (Regulation L-19, App. p. A6).

No action has ever been taken to revoke the Permit. On the contrary, since 1935 the Department has regularly collected the annual rental prescribed by the Permit from the Company (R. 989).

[8] If certiorari is granted the Company will urge its contention, disregarded by the court below, that Holter was authorized by the Act of April 12, 1906. (34 Stat. 111).

The court below affirmed the Commission's holding that the Company does not have authority to occupy the government lands at Hebgen, on the ground that formal approval by the Secretary of Agriculture of the acquisition by the Company was not obtained (R. 1675).

Hauser

The Company occupies public lands at Hauser under a Right of Way granted by the Secretary of the Interior (Ex. 2, Vol. V); it occupies forest lands there under a Use Agreement from the Forest Service (R. 1120); both authorizations were issued in 1907, under the Act of February 15, 1901, to the Company's predecessor. The Company acquired both authorizations through the 1912 merger by which the Company was formed (R. 998), without the formal approval of the Secretaries required by their regulations for a "transfer to a new permittee."

The regulations of the Secretary of the Interior applicable to the Right of Way were issued in 1913 and provide that violation by a final permittee of any of the provisions of the regulations shall be sufficient ground for revocation, but that no permit will be deemed to be revoked except on the issuance by the Secretary of a specific order of revocation. (Reg. 19, App. p. A5).

In 1929 the Secretary of the Interior notified the Company that thereafter specified rentals would be required for its occupancy of the public lands at Hauser (R. 1534). The Secretary has at all times since collected the prescribed annual rentals from the Company (R. 990).

The Agreement covering forest lands provided it was not transferable, but the applicable regulations issued in 1915 contain the same provisions as to transfer and revocation as are contained in the Hebgen permit (Regs. L-17 and L-19; App. p. A6). The Secretary of Agriculture has collected the annual rentals under this Agreement from the Company since 1912 (R. 990).

No action has ever been taken to revoke either the Right of the Way or the Agreement.

The court below affirmed the Commission's holding that the Company has no authorization to occupy either public or forest lands at Hauser, on the ground that the formal approval of the Secretaries to the acquisition by the Company in 1912 was not obtained (R. 1675).

SPECIFICATION OF ERRORS TO BE URGED

The Court of Appeals for the District of Columbia Circuit erred:

1. In holding that the Missouri River from Fort Benton, Montana, to Three Forks, Montana, or any part of such reach, is navigable waters of the United States.

2. In holding that Petitioner does not have valid authorization for occupancy of government lands at the Hauser and Hebgen projects.

3. In holding that hearsay evidence of the type here in question is admissible in this proceeding, and is substantial evidence.

4. In remanding to the Commission that phase of the case relating to the Canyon Ferry plant.

5. In holding that Petitioner is required to obtain Federal Power Commission licenses for the continued operation and maintenance of its 6 Missouri River plants and its Hebgen reservoir.

REASONS FOR GRANTING THE WRIT

1. The Court of Appeals for the District of Columbia Circuit has construed and applied the Federal Power Act, particularly Sections 3(8), 23(a) and 23(b), in a manner which is contrary to the intention of Congress. The proper construction of these sections has never been settled by this Court. The court below has also expanded the concept and definition of navigable waters of the United States in a manner which is contrary to the applicable principles laid down by this Court in a series of decisions, commencing

with The Daniel Ball[9] and leading down to the New River case.[10] Because of the far reaching importance of the decision, not only in the application and administration of the Federal Power Act, but also to all persons whose rights depend on the navigability or non-navigability of portions of streams, these questions should be determined by this Court.

Section 3(8)

Congress intended, and so expressed itself, that the definition of "navigable waters" in Section 3 of the Federal Water Power Act of 1920, which limits the licensing authority of the Commission, should be no broader than the Court decisions on navigable waters of the United States at that time. That definition has remained unchanged.

In the course of its lengthy consideration of the definition, Congress at one time considered leaving navigable waters undefined, which would mean that the courts would decide in each instance whether waters were navigable;[11] Congress also considered defining the term to mean waters over which Congress had jurisdiction under the Commerce clause.[12] Both suggestions were rejected.[13]

The definition adopted was considered to be somewhat narrower than the definition as laid down by the decisions of the Supreme Court up to 1920 when the Federal Water Power Act was passed. This is shown by the fact that when Senator King, just prior to the passage of the Act, expressed apprehension that the Commission would claim jurisdiction over all streams, Senators Fletcher and Lenroot both stated

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[9] 10 Wall. 557

[10] 311 U.S. 377

[11] 56 Cong. Rec. 9757-9761

[12] 56 Cong. Rec. 8929

[13] House Rept. No. 1147, 65th Cong., 3rd Session.

that the definition was restrictive;[14] and Senator Walsh of Montana, an able lawyer later appointed Attorney General of the United States, stated that in his opinion the definition did not go quite so far as the definition given by this Court.[15]

Under the decisions which Congress had before it, and which were discussed at length on the floor of Congress,[16] to constitute navigable waters of the United States a stream must, in its natural or actually improved condition, afford by itself a continuous highway over which useful commerce of a substantial and permanent character is or may be carried on with other states or foreign countries in the customary mode in which such commerce is conducted by water, including any falls, shallows and rapids which did not prevent or terminate such use for such commerce.[17]

The only important decision of this Court on this subject since 1920 came in the New River case, where this Court approved the definition in The Daniel Ball as the basic concept,[18] but held that if the reach in question could be improved at a cost where there would be a balance between

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[14] Senator Lenroot stated:

"Mr. President, the Senator from Utah (Mr. King) seems to think that this amendment enlarges the jurisdiction of Congress and this Commission over navigable streams. Exactly the contrary is true. This definition unquestionably restricts the technical jurisdiction which Congress would have if this language, instead of attempting to define navigable streams, should merely be the term 'navigable streams.'" Senator Fletcher then stated: "Mr. President, I quite agree with the Senator from Wisconsin in his construction of this paragraph." (59 Cong. Rec. 1104).

[15] 59 Cong. Rec. 1476.

[16] 59 Cong. Rec. 6529-6531, 7725-7726.

[17] The Daniel Ball, 10 Wall. 557, 563; The Montello, 11 Wall. 411, 415; The Montello, 20 Wall. 430, 442, 445; Leovy v. United States, 177 U. S. 621, 632.

[18] United States v. Appalachian Electric Power Co., 311 U.S. 377, 406.

cost and need at a time the improvement would be useful, it constituted navigable waters of the United States.[19] Possibility of such improvement is ruled out in the instant case, as the evidence is undisputed that to improve the Missouri so that the improvement would be useful would have cost at least $1,300,000,000 in 1946, and that such an expenditure in the light of the possible revenue would be entirely unjustified.[20]

The court below held that, in spite of the non-navigable stretch of falls between Fort Benton and the mouth of Sun River, the entire 263-mile reach from Fort Benton to Three Forks is "navigable waters" under Section 3(8) (R. 1672). The fact is that the impassable 49-mile reach just above Fort Benton absolutely terminated interstate commerce. The fact that not one passenger or one pound of freight was ever portaged around this reach upstream, and that no freight and, with the doubtful exception of returning miners in 1866 and 1867, no passengers were transported around it downstream, conclusively shows that the Missouri above Fort Benton was neither used nor suitable for use for the transportation of persons or property in interstate commerce.

Moreover, this holding is directly contrary to the intention of Congress, which intended to include only such falls, shallows and rapids as were held not to preclude navigability in The Montello.

Mr. Esch, who was in charge of the bill in the House when it returned from final conference, referred to the fact that the definition included falls, shallows and rapids and said:

> "Personally I think they would have been considered such anyhow under the decision of the Supreme Court in The Montello case, recorded in Twentieth Wallace."[21]

Senator Nelson, in charge of the bill in the Senate, discussing the same provision in the closing debates in the Senate, said:

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[19] Ibid. p. 407.

[20] R. 661, 789, 793, 794, 845, 857.

[21] 59 Cong. Rec. 6523.

> " * * * I think the Supreme Court has long ago settled, as nearly as it can be settled, the question as to the navigability of streams. I refer to their decision in the case of The Montello.
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> " * * * The Supreme Court held that, although there were rapids and falls in the stream, *around which it was necessary to portage the freight*, it was a navigable stream so came within the Commerce Clause of the Constitution."[22] (Emphasis supplied)

How far the decision below goes beyond that intention is clearly demonstrated by the fact that in The Montello, this Court states that the rapids "embarrassed the navigation of early days, but they did not destroy nor even much arrest it,"[23] while in the instant case the court below found that the falls section "always presented a natural barrier to through navigation." (R. 1671).

Never before has it been contended, much less held, that a portion of a stream is navigable unless that portion was actually used throughout its entire length either for through traffic by boat in both directions, without the boat leaving the water, or for the through transportation of logs or lumber.[24] In this case no attempt was ever made to take

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[22] 59 Cong. Rec. 7729, 7730.

[23] 20 Wall. 432.

[24] In the Daniel Ball, 10 Wall. 557, the 12 miles of the Grand River under consideration was used daily by the steamer The Daniel Ball. The only question was whether, connecting as it did with Lake Michigan, the reach constituted navigable waters of the United States.

In the Fox River, held navigable in The Montello, the only perpendicular fall was a 2-foot fall near Grand Chute (20 Wall. 431). The entire reach, including the 2-foot fall, was navigated by large numbers of Durham boats, which traversed the entire length in both directions without leaving the water even before river improvements were made. The Fox, with the Wisconsin, was one of the principal

either boats or logs or lumber through the 17-mile reach constituting the great falls of the Missouri, there was not one instance of commercial use of the remaining 32 miles between the falls and Fort Benton, and even the use of the balance of the 263-mile reach for local traffic was much less than the use shown of any reach ever held to constitute navigable waters of the United States.

Never before has a stream been held to constitute a navigable water of the United States unless the requisite use existed throughout an *interstate* reach. In this case, interstate use always terminated at Fort Benton, and now would have to terminate below the Fort Peck dam.

No such expansion of the concept of navigable waters of the United States should become final without being considered on the merits by this Court.

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avenues of early day commerce between the Great Lakes and the Mississippi (20 Wall. 432).

The Des Plaines River, involved in the Economy Light and Power case (256 U.S. 113), was used without even portaging any of the cargo for an average of 116 days per year and the traffic, both upstream and down, was heavy (256 F. 795-6).

The reaches held navigable intrastate in United States v. Utah, except for 14 miles where the average slope was 3.5 feet, had a maximum average slope of 2 feet to the mile and were navigated both upstream and down by oar, steam and motor (283 U.S. 64, 78-82).

The portion of the New River held navigable in U.S. vs. Appalachian Electric Power Co. included only 18 miles where the fall exceeded 4 feet to the mile and boats traveled its entire length in both directions without leaving the water; additionally it was used to float logs and lumber (311 U.S. 412, 415, 416). Even so, this portion was held navigable only on the basis of use plus ready improvability, which admittedly is not feasible on the Missouri above Fort Benton. (Footnote 20, supra).

Section 23(a)

Section 23(a) (App. p. A1), enacted in 1920 and never amended, so far as applicable here, specifically provides that the Act shall not be construed as affecting any permit or valid existing right of way theretofore granted. In discussing this provision, Representative French stated:

> "* * * We leave it subject to the discretion of the Secretary of the Interior, the Secretary of Agriculture, or the Secretary of War, as the case may be, to do or not to do, under the permit that has been issued, that which the respective Secretaries have the power now to do."[25]

and that

> " * * * The department to-day has the authority to modify and revoke permits heretofore granted. We do not disturb that."[26]

Senator Phipps, responding to an inquiry by Senator Johnson, assured him that he found nothing in the bill which would lead him to think that there was any danger that it would interfere with permits for occupancy of public lands under which utilities were then operating.[27]

The Commission has no authority to revoke permits or rights of way granted prior to 1920 by the Secretaries of Interior or Agriculture under the Act of February 15, 1901.[28] The decision of the court below, contrary to the clear language of the Act and to the intent of Congress as above shown, permits the Commission to do indirectly that which it cannot do directly. Questions of such importance in the administration of the Act of 1901 and of the Federal Power Act should be settled by this Court.

2. The court below held that the entire 263-mile reach from Fort Benton to Three Forks is "navigable waters" under Section 3(8), because the United States in 1880 spent

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[25] 56 Cong. Rec. 10032
[26] 58 Cong. Rec. 2242
[27] 59 Cong. Rec. 1173
[28] Opinion of Chief Counsel, 1 An. Rept. (F.P.C.) 142, 143.

$15,000 in rock removal and construction at two rapids about 100 miles above the falls and spent about $66,000 from 1895 to 1898 in the 16 miles just above the falls (R. 1673). The work was then abandoned without having produced any noticeable effect on commerce (R. 560). This holding is in direct conflict with the decision of this Court in Oklahoma v. Texas.[29] In that case the United States had spent about $500,000 improving a reach of the Red River on which there had been some through interstate traffic. The first appropriation was in 1868, the last in 1916. The project was abandoned. This Court held on page 590:

> " * * * Any inference of navigable capacity arising from the fact that this project was undertaken is much more than overcome by the actual conditions disclosed in the course of the work."

3. The court below apparently attached some significance to factors other than navigability, for it states:

> " * * * Even if such a stream is never actually used for transportation there is no doubt that it may be necessary to use it for flood control, watershed development, regulation of the navigable capacity of the portions of the river actually used for transportation, etc." (R. 1672).

If this is a holding that the Commission has authority to require licenses for dams constructed prior to 1935 in waters other than navigable waters, it is contrary to the clear language of Section 23(b). Prior to the 1935 amendment the filing of a declaration of intention was discretionary.[30] The 1935 amendment required a declaration of intention only as to dams constructed thereafter. Since all of the Company's dams were constructed prior to 1935, no license can be required on the ground that they are located in waters which, although not navigable, it may be necessary to use for flood control or other purposes.

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[29] 258 U.S. 574

[30] First Iowa Hydro-Electric Cooperative v. Federal Power Commission, 328 U.S. 152, 172 footnote.

4. In holding that the authorization by Congress of the Fort Peck dam did not constitute an abandonment by Congress of navigability above it (R. 1673) the court below failed to give effect to the intent of Congress, as evidenced by the legislative history of the Act authorizing Fort Peck.[31] In 1927 Congress had ordered a "308" report on the Missouri River.[32] In preparing the report the Army Engineers had to choose between constructing a reservoir at Fort Peck to furnish water for open channel navigation below Sioux City, Iowa, which would render the river above Fort Peck non-navigable because of the method of operation, and a canalization plan above Sioux City (R. 579, 603). The Chief of Engineers, after considering these alternatives, informed Congress that the canalization plan could not possibly be justified[33] and recommended the construction of Fort Peck (R. 581). On the basis of that report Congress authorized Fort Peck, specifying that it be built subject to the conditions in House Document No. 238.[34] This was a positive determination by Congress to abandon navigability above Fort Peck.

5. The failure of the court below to hold that the recognition by the Secretary of the Interior of ownership by the Company of the Right of Way at Hauser and the recognition by the Secretary of Agriculture of the ownership by the Company of the Permit at Hebgen and of the Special Privilege Agreement at Hauser constituted a recognition of the Company as the Permittee under these authorizations and a waiver by the Secretary of any failure to secure formal approval of the acquisition by the Company of these authorizations is in conflict, at least in principle, with the decisions of the Court of Claims in Smith v. United States[35] and

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[31] 49 Stat. 1028, 1034.
[32] 44 Stat. 1010.
[33] H.D. No. 238, p. 6.
[34] 49 Stat. 1034.
[35] 24 Ct. Cls. 209.

Palmer v. United States.[36] Both cases hold that the regulations promulgated by the Secretary, while binding on his subordinates, are not binding on the Secretary. The Palmer case further holds that any regulation that the Secretary may have made can be set aside by him at any time.[37]

6. The holding by the court below that the acquisition by the Company of the authorizations to occupy government lands at Hauser was a "transfer to a new permittee" is in conflict, at least in principle, with the decision of this Court in Seaboard Airline Ry. v. United States.[38] That case turned on the proper interpretation of Sec. 3477, U. S. Revised Statutes,[39] which declared all transfers or assignments of any claim against the United States "absolutely null and void." In that case the Railway sued in the Court of Claims to recover for transportation services rendered by another company to whose rights it had succeeded through merger or consolidation. This Court there held that the merger or consolidation was not a transfer within the meaning of Section 3477. The reasoning of that case is applicable to the instant case and is in conflict with the holding of the court below.

7. The holding by the court below that the acquisition by the Company of the Final Power Permit covering government land at Hebgen was a "transfer to a new permittee" is in conflict, at least in principle, with the decision of the Court of Appeals for the Second Circuit, in Novo Trading Corp. v. Commissioner of Internal Revenue,[40] which also involved Section 3477 of the Revised Statutes. In that case the court held that the assignment of a claim for refund of customs duties to the stockholders in the liquidation of the corporate owner of the claim was valid.

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[36] 72 Ct. Cls. 401.
[37] Ibid. 405.
[38] 256 U. S. 655.
[39] Printed App. p. A4.
[40] 113 Fed. (2d) 320.

8. The court below held that hearsay evidence, including newspaper items and the unsworn "statement of position" of the Chief of Engineers, expressing his opinion on questions of law, constitute substantial evidence and are admissible under Section 308(b) of the Federal Power Act,[41] which provides that in hearings before the Commission "the technical rules of evidence need not be applied." (R. 1673, 1676). This holding conflicts in principle with a statement in Consolidated Edison Company v. N.L.R.B. that "mere uncorroborated hearsay or rumor does not constitute substantial evidence."[42] Moreover, the holding that newspaper clippings can be considered as evidence of the facts presented in them is contrary to an unbroken line of authority[43] and is an extremely dangerous precedent. On both reason and authority[44] the rule against hearsay is a substantive, not a technical, rule of evidence. Because of its applicability to agency proceedings generally, this holding of the court below should be reviewed by this Court.

9. The proper concept of the definition of navigable waters of the United States has always, because of its far reaching consequences, been a matter which has received the careful consideration of this Court. Any expansion of that concept has been of particular concern to this Court. So tremendous an expansion as is enunciated in the decision of the court below should be reviewed here.

The questions raised are of the utmost importance in settling

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[41] Printed App. p. A2.

[42] 305 U.S. 197, 230.

[43] Wolf v. Drew, 94 Cal. A. 449, 271 Pac. 346 on 347; Green v. Ashland Water Co., 101 Wis. 258, 77 N. W. 722, 727; Haralambo's Executor v. Christopher, 231 Ky. 550, 21 S.W. (2d) 983 on 985.

[44] Englebretson v. Industrial Acc. Comm., 170 Cal. 793, 151 Pac. 421; Olson-Hall v. Industrial Acc. Comm., 71 Colo. 228, 205 Pac. 527.

the scope of the authority of the Federal Power Commission under the Federal Power Act, both as to navigable waters and as to government lands. They are of equal importance to the Departments of Interior and Agriculture in the administration of those lands under the Act of February 15, 1901. If the decision below stands, those Departments will be deprived of the revenues for the occupancy of government lands by the Company, and the Federal Power Commission will have power to declare invalid permits and rights of way regardless of the fact that the Secretaries having jurisdiction recognize them and consider them valid and existing.

State and local governmental subdivisions receiving taxes from the projects involved and other projects similarly situated would be deprived of this revenue in the event the United States takes over the projects under Section 14 of the Federal Power Act.[45] Because of this, the counties of Cascade, where the Great Falls plants are located, Lewis and Clark, where Holter and Hauser are located, and Gallatin, where Hebgen is located, intervened in this proceeding (R. 151) and presented evidence on this phase of the case (R. 1016-1023).

The decision is vitally important to states and to persons holding federal patents or hereafter receiving federal patents to lands bordering on streams, the navigability of which might be affected by the decision below. If a river is navigable when a state is admitted to the Union, title to the bed vests in the state; if it is non-navigable, title remains in the United States and passes to its patentees.[46] The decision below is in effect a holding that the river was navigable when the state was admitted. If the decision stands, it is equally applicable to other streams and would cast doubt on titles long considered settled.

This result would follow because of the expansion by the

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[45] 16 U.S.C. 807

[46] Oklahoma v. Texas, 258 U.S. 574, 583.

court below of the concept of navigable waters of the United States, for it is axiomatic that navigable waters of the United States must be navigable in fact.

Questions of such importance in the administration of the Federal Power Act and of the Act of February 15, 1901, and of such vital concern to so many land owners should be settled by this Court.

CONCLUSION

For the foregoing reasons this Petition for a Writ of Certiorari should be granted.

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